

# **NEW JERSEY BOARD OF PUBLIC UTILITIES**

## **Proposed Amendments to N.J.A.C. 14:1-5.14, Rules Governing the Board's Approval of Mergers, Consolidations, Acquisitions and/or Changes In Control**

Proposed December 19, 2005

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### **PUBLIC UTILITIES**

#### **BOARD OF PUBLIC UTILITIES**

#### **Standard of Review of Petitions for approval of a merger, consolidation, acquisition and/or change in control**

**Proposed Amendments:** N.J.A.C. 14:1-5.14(a) through (d)

Authorized By: Board of Public Utilities, Jeanne M. Fox, President, and Frederick F. Butler, Connie O. Hughes and Jack Alter, Commissioners.

Authority: N.J.S.A. 48:2-13, N.J.S.A. 48:2-51.1, N.J.S.A. 48:3-7, N.J.S.A. 48:3-10, N.J.S.A. 48:2-23 and N.J.S.A. 48:2-21

Calendar Reference: Exempt by virtue of 60 day comment period.

BPU Docket Number: AX05080742

Proposal Number: PRN 2005-

The Board will hold a public hearing on this proposal at:  
1:30 p.m. on February 7, 2006  
Board Hearing Room

New Jersey Board of Public Utilities  
2 Gateway Center, 8<sup>th</sup> Floor  
Newark, New Jersey

Written comments will be accepted until the close of business on February 17, 2006.  
Direct comments to:

New Jersey Board of Public Utilities  
Kristi Izzo, Secretary  
ATTN: BPU Docket Number: AX05080742  
Two Gateway Center  
Newark, New Jersey 07102

The agency proposal follows:

### **Summary**

The New Jersey Board of Public Utilities is proposing amendments to its rules regarding procedures for approval of a public utility merger or consolidation, found at N.J.A.C. 14:1-5.14.

Under N.J.S.A. 48:2-13, the Board has been vested by the Legislature with the general supervision and regulation of, and jurisdiction and control over, all public utilities "so far as may be necessary for the purpose of carrying out the provisions of [Title 48]." Pursuant to N.J.S.A. 48:3-10, a public utility may not sell or transfer any shares of its capital stock to any other public utility, unless authorized to do so by the Board. Similarly, pursuant to N.J.S.A. 48:3-7, a public utility may not sell, merge or consolidate its property, franchises, privileges or rights with that of any other public utility, unless authorized to do so by the Board. Additionally, the Board is required by N.J.S.A. 48:2-51.1 to evaluate the impact of any proposed acquisition of a public utility on competition, rates, employees and the provision of safe, adequate and proper utility service.

In furtherance of the statutory mandates, the Board promulgated rules at N.J.A.C. 14:1-5.14 governing the form and content of petitions for approval of a merger or consolidation of one public utility of New Jersey with that of another public utility. These rules set forth the information which must be included in those merger petitions. Although N.J.A.C. 14:1-5.14(a)10 requires merger petitioners to describe "[t]he various benefits to the public and the surviving corporation which will be realized as the result of the merger," the existing rule does not expressly identify a standard of review by which the Board will evaluate the information the rule requires as well as merger filings generally. The proposed amendments provide such a standard.

The Board has long considered the standard of review for reviewing mergers, consolidations, acquisitions and/or changes in control on a case-by-case basis; and generally has used either a "no harm" standard or a "positive benefits" standard, also sometimes referred to as a "best interests of the public" standard. However, in a recent decision in I/M/O the Joint Petition of Public Service Electric and Gas Company and

Exelon Corporation for Approval of a Change in Control of Public Service Electric and Gas Company, and Related Authorizations, BPU Docket No. EM05020106, the Board determined to apply a positive benefits standard, and directed the initiation of a rulemaking proceeding to apply a “positive benefits” standard to petitions to the Board for the acquisition of control of public utilities be promulgated.

The Board is therefore proposing amendments to N.J.A.C. 14:1-5.14. The proposal heading is amended by adding "acquisition and/or change in control; standard of review," which now incorporates the added requirements of the section. The amendments also delete the text in existing N.J.A.C. 14:1-5.14(a), and recodify existing N.J.A.C. 14:1-5.14(a)1 through 14 as new subsection (b), as described below. A new (a) is proposed that clarifies that the rules apply to all of the following:

- (1) a merger or consolidation of one public utility of New Jersey with that of another public utility;
- (2) a merger or consolidation of one public utility of New Jersey with a parent holding company of another public utility or with any other corporate or business entity; or
- (3) the acquisition of a public utility of New Jersey and/or a change in control of the public utility.

Although the proposed amendments expressly apply the rules to acquisitions and/or changes in control which the existing rules do not, the Board has historically received and evaluated filings related to such transfers of public utility assets.

The Board is proposing to add new introductory language at N.J.A.C. 14:1-5.14(b), which includes the content requirements for a petition that are found in the existing rules at subsection (a). The paragraphs under N.J.A.C. 14:1-5.14(b), recodified from N.J.A.C. 14:1-5.14(a), are amended to add “consolidated, acquired and /or changed” or “consolidated, acquired and/or change in control,” as appropriate to incorporate new N.J.A.C. 14:1-5.14(a).

Proposed new (c) sets forth the “positive benefits” standard of review for the evaluation of public utility mergers, consolidations, acquisitions and/or changes in control. Finally, consistent with the Board’s historic practice, proposed N.J.A.C. 14:1-5.14(d) assigns to the petitioning parties the burden of proof, by a preponderance of the evidence, that the requirements of this section have been met.

### **Social Impact**

The proposed amendments will have a positive social impact in that they will continue and codify the Board's application of the "positive benefits standard" in its oversight of utility mergers, consolidations, acquisitions and/or changes in control. While the proposed amendments expressly apply the rules to two types of petitions not included in the existing rules, the Board has historically reviewed acquisitions and changes in control and applied the "positive benefit" standard to those petitions on a case-by-case basis. This standard has a positive social impact in that it requires petitioners to prove that the transaction they wish to complete will benefit the public. In

addition, it provides a clear, codified mandatory standard, thus enhancing regulatory certainty.

### **Economic Impact**

The proposed amendments will have positive economic impacts for ratepayers and citizens of New Jersey, and may have a slight negative economic impact on companies that wish to complete a merger, consolidation, acquisition and/or change in control involving a New Jersey utility. In the Board's deliberations regarding a merger, consolidation, acquisition and/or change in control, the Board must balance the interests of many entities, including the utilities' and other merging parties' officers and shareholders, as well as utility customers and the public at large. A codified positive benefits standard will require petitioners to provide documentation that the transaction will not only have no adverse impact, but that it will benefit the citizens of New Jersey. In the Board's deliberations and balancing of interests, this standard will give additional weight to concern for the public good. This may have a beneficial economic impact on ratepayers, by ensuring that the covered transactions do not result in unreasonable rate hikes. It also may benefit the greater public of New Jersey by ensuring that these transactions are performed so as to maximize the positive impact on the State economy. It may have a slight adverse economic impact on the petitioners, because the preparation and submittal of the documentation of public benefit may necessitate some minor expenditures. Although the proposed amendments expressly apply the rules to acquisitions and/or changes in control which the existing rules do not, the Board has historically received and evaluated filings related to such transfers of public utility assets.

### **Federal Standards Statement**

Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. require State agencies that adopt, readopt or amend State regulations that exceed any Federal standards or requirements to include in the rulemaking document a Federal Standards Analysis. N.J.A.C. 14:1-5.14 is not promulgated under the authority of, or in order to implement, comply with or participate in any program established under Federal law or under a State statute that incorporate or refers to Federal law, Federal standards, or Federal requirements. Accordingly, Executive Order No. 27 (1994) and N.J.S.A. 52:14B-1 et seq. do not require a Federal Standards Analysis for these proposed amendments.

### **Jobs Impact**

The proposed amendments affect the standard of review that the Board will apply to petitions for mergers, consolidations, acquisitions and/or changes in control of public utilities. The proposed amendments will not directly affect the generation or loss of jobs. However, these transactions may result in job gains or losses, such as in a case where an out-of-state company purchases a New Jersey public utility. As part of its review of such transactions, the Board must weigh a multiplicity of factors. One of the factors considered is job gains or losses for New Jersey. It is possible that the "positive benefits" standard of review may slightly increase the Board's ability to take job gains or

losses into account in reviewing these transactions. However, because of the many other factors that the Board must also consider, the impact on jobs of imposing the positive benefits standard will likely be minor.

### **Agriculture Industry Impact**

The Board does not expect these proposed amendments to have any effect on agriculture in New Jersey. These rules apply to information submitted by companies in the energy, telecommunications and water and wastewater industries, and so will not apply to agriculture.

### **Regulatory Flexibility Statement**

The proposed amendments will not impose any additional record keeping, reporting or other compliance requirements on small businesses because they do not apply to any small businesses. A small business, as defined in the New Jersey Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq., is a business that has fewer than 100 employees. There are some water companies subject to the rules that may meet the definition of a small business. If anything, these amendments slightly reduce the compliance burden for such businesses.

### **Smart Growth Impact**

The Board anticipates that the proposed amendments will have no impact on either the achievement of smart growth or the implementation of the State Development and Redevelopment Plan. The State Plan is intended to "provide a coordinated, integrated and comprehensive plan for the growth, development, renewal and conservation of the State and its regions" and to "identify areas for growth, agriculture, open space conservation and other appropriate designations." N.J.S.A. 52:18A-199a. Smart growth is based on the concepts of focusing new growth into redevelopment of older urban and suburban areas, protecting existing open space, conserving natural resources, increasing transportation options and transit availability, reducing automobile traffic and dependency, stabilizing property taxes, and providing affordable housing." These rules apply uniformly Statewide and the Board does not expect that they will affect the location of future development. Therefore, the proposed amendments will not impact smart growth or the State Plan.

**Full text** of the proposed amendments follows (additions indicated in boldface thus; deletions indicated in brackets [thus]):

#### **14:1-5.14    Petitions for approval of a merger, [or] consolidation, acquisition and/or change in control; standard of review**

[(a) Petitions for approval of a merger or consolidation of one public utility of New Jersey with that of another public utility shall conform to the provisions of N.J.A.C. 14:1-4 and through 5.4 and 5.9 to the extent applicable, and shall contain in the petition, or as attached exhibits, the following information:]

(a) A petition for approval of any of the following shall conform to the provisions of N.J.A.C. 14:1-4 and N.J.A.C. 14:1-5.1 through 5.4 and 5.9 to the extent applicable:

1. A merger or consolidation of one public utility of New Jersey with that of another public utility;
2. A merger or consolidation of one public utility of New Jersey with a parent holding company of another public utility or with any other corporate or business entity; or
3. The acquisition of a public utility of New Jersey and/or a change in control of the public utility.

(b) A petition for approval of any of the actions listed at (a) above shall contain in the petition, or as attached exhibits, the following information:

1. A copy of the agreement of merger, [or] consolidation, acquisition and/or change in control;
2. Copies of corporate resolutions of the stockholders of each of the corporations authorizing the transaction;
3. Copies of recent balance sheets of each company and a pro forma balance sheet of the continuing company;
4. Copies of recent income statements of the operation of each of the companies involved and a pro forma income statement of the continuing corporation, in sufficient detail;
5. Copies of certificates of incorporation of each corporation to be merged, consolidated, acquired and/or changed and amendments thereto, if not heretofore filed with the Board;
6. The total number of shares of each of the various classes of capital stock proposed to be issued, if any, by the surviving corporation; the par or stated value per share; and the total amount of new capital stock to be issued;
7. The percentage, and the manner in which, if any, the presently outstanding capital stock of the corporations involved will be exchanged for the new stock of the surviving corporation;
8. Whether any franchise cost is proposed to be capitalized on the books of the surviving corporation, and, if so, the reasons therefor, and in what manner and over what period the items are proposed to be amortized;
9. The names and addresses of the new officers, directors and principal stockholders and the number of shares to be held by each in the surviving corporation;
10. The various benefits to the public and the surviving corporation which will be realized as the result of the merger, consolidation, acquisition and/or change in control;
11. Proposed changes, if any, by the surviving corporation, in company policies with respect to finances, operations, accounting, rates, depreciation, operating schedules, maintenance and management affecting the public interest;
12. Proof of service of notice of the proposed merger, consolidation, acquisition and/or change in control to the public, the municipalities being served by the

- companies to be merged, consolidated, acquired and/or changed, and the public utilities serving in the area, pursuant to N.J.A.C. 14:1-4.5;
13. Proof of compliance with rules, regulations and statutes requiring approval from other State and Federal regulatory agencies having jurisdiction in the matter; and
  14. A statement of the fees and expenses to be incurred in connection with the merger, consolidation, acquisition and/or change in control and the accounting disposition to be made thereof on the books of the surviving corporation.

(c) The Board shall not approve a merger, consolidation, acquisition and/or change in control unless it is satisfied that positive benefits will flow to customers and the State of New Jersey and, at a minimum, that there are no adverse impacts on any of the criteria delineated in N.J.S.A. 48:2-51.1.

(d) The petitioners seeking merger, consolidation, acquisition and/or change in control of a public utility shall have the burden of proving to the Board, by a preponderance of the evidence, that the requirements of this section are met.